

105TH CONGRESS  
2D SESSION

# H. R. 4239

To revise the banking and bankruptcy insolvency laws with respect to the termination and netting of financial contracts, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

JULY 16, 1998

Mr. LEACH (for himself, Mr. LAFALCE, Mr. MCCOLLUM, and Mrs. ROUKEMA) introduced the following bill; which was referred to the Committee on Banking and Financial Services, and in addition to the Committees on the Judiciary, and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## A BILL

To revise the banking and bankruptcy insolvency laws with respect to the termination and netting of financial contracts, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

### 3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Financial Contract  
5 Netting Improvement Act of 1998”.

1 **SEC. 2. TREATMENT OF CERTAIN AGREEMENTS BY CON-**  
 2 **SERVATORS OR RECEIVERS OF INSURED DE-**  
 3 **POSITORY INSTITUTIONS.**

4 (a) **DEFINITION OF QUALIFIED FINANCIAL CON-**  
 5 **TRACT.**—Section 11(e)(8)(D)(i) of the Federal Deposit In-  
 6 surance Act (12 U.S.C. 1821(e)(8)(D)(i)) is amended by  
 7 inserting “, resolution or order” after “any similar agree-  
 8 ment that the Corporation determines by regulation”.

9 (b) **DEFINITION OF SECURITIES CONTRACT.**—Sec-  
 10 tion 11(e)(8)(D)(ii) of the Federal Deposit Insurance Act  
 11 (12 U.S.C. 1821(e)(8)(D)(ii)) is amended to read as fol-  
 12 lows:

13 “(ii) **SECURITIES CONTRACT.**—The  
 14 term ‘securities contract’—

15 “(I) means a contract for the  
 16 purchase, sale, or loan of a security,  
 17 or any mortgage loan, mortgage relat-  
 18 ed security (as defined in section  
 19 3(a)(41) of the Securities Exchange  
 20 Act of 1934 (15 U.S.C. 78c(a)(41)) or  
 21 interest therein, including an option  
 22 for the purchase or sale of a security,  
 23 certificate of deposit, or group or  
 24 index of securities (including any in-  
 25 terest therein or based on the value  
 26 thereof) or any option entered into on

1 a national securities exchange relating  
2 to foreign currencies, or the guarantee  
3 of any settlement of cash or securities  
4 by or to a securities clearing agency,  
5 or any other similar agreement;

6 “(II) does not include any par-  
7 ticipation in or servicing agreement  
8 for a commercial mortgage loan unless  
9 the Corporation determines by regula-  
10 tion, resolution, or order to include  
11 any such participation within the  
12 meaning of such term; and

13 “(III) does not include an agree-  
14 ment that provides for the transfer of  
15 securities against the transfer of  
16 funds by the transferee of such securi-  
17 ties with a simultaneous agreement by  
18 such transferee to transfer to the  
19 transferor thereof securities against  
20 the transfer of funds; provided, how-  
21 ever, the exclusion contained in this  
22 subparagraph does not apply to any  
23 such agreement for the transfer of the  
24 types of securities referred to in sec-  
25 tion 1821(e)(8)(D)(v) against funds

1 so long as the simultaneous agreement  
2 provides for the transfer of funds  
3 against such securities within 1 year  
4 of the transfer of such securities.”.

5 (c) DEFINITION OF COMMODITY CONTRACT.—Sec-  
6 tion 11(e)(8)(D)(iii) of the Federal Deposit Insurance Act  
7 (12 U.S.C. 1821(e)(8)(D)(iii)) is amended to read as fol-  
8 lows:

9 “(iii) COMMODITY CONTRACT.—The  
10 term ‘commodity contract’ has the mean-  
11 ing given to such term in section 761(4) of  
12 title 11, United States Code, or any other  
13 similar agreement.”.

14 (d) DEFINITION OF FORWARD CONTRACT.—Section  
15 11(e)(8)(D)(iv) of the Federal Deposit Insurance Act (12  
16 U.S.C. 1821(e)(8)(D)(iv)) is amended to read as follows:

17 “(iv) FORWARD CONTRACT.—The  
18 term ‘forward contract’ means a contract  
19 (other than a commodity contract) for the  
20 purchase, sale, or transfer of a commodity  
21 or any similar good, article, service, right,  
22 or interest which is presently or in the fu-  
23 ture becomes the subject of dealing in the  
24 forward contract trade, or product or by-  
25 product thereof, with a maturity date more

than 2 days after the date the contract is entered into, including, but not limited to, a repurchase agreement, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any combination thereof or option thereon, or any other similar agreement.”.

(e) DEFINITION OF REPURCHASE AGREEMENT.—  
Section 11(e)(8)(D)(v) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)(D)(v)) is amended to read as follows:

“(v) REPURCHASE AGREEMENT.—The term ‘repurchase agreement’ (which also applies to a reverse repurchase agreement)—

“(I) means an agreement, including related terms, that provides for the transfer of certificates of deposit, mortgage-related securities (as such term is defined in section 3(a)(41) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(41)), any mortgage loan, and any interest in any mortgage loan, eligible bankers’ accept-

ances, qualified foreign government securities or securities that are direct obligations of, or that are fully guaranteed as to principal and interest by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, or securities with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, mortgage-related securities, and mortgage loan, and any interest in any mortgage loan, eligible bankers' acceptances, or securities as described above, at a date certain not later than 1 year after such transfers or on demand, against the transfer of funds, or any other similar agreement; and

“(II) does not include any participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or

1                   order to include any such participa-  
 2                   tion within the meaning of such term.  
 3                   For purposes of this clause, the term  
 4                   ‘qualified foreign government security’  
 5                   means a security that is a direct obligation  
 6                   of, or that is fully guaranteed by, the cen-  
 7                   tral government of a member of the Orga-  
 8                   nization for Economic Cooperation and  
 9                   Development (as determined by regulation  
 10                  or order adopted by the appropriate Fed-  
 11                  eral banking authority).”.

12           (f) DEFINITION OF SWAP AGREEMENT.—The Fed-  
 13   eral Deposit Insurance Act (12 U.S.C. 1821(e)(8)(D)(vi))  
 14   is amended to read as follows:

15                   “(vi) SWAP AGREEMENT.—The term  
 16                   ‘swap agreement’—

17                           “(I) means any agreement, in-  
 18                           cluding the terms and conditions in-  
 19                           corporated by reference in any such  
 20                           agreement, which is an interest rate  
 21                           swap, option, future, or forward  
 22                           agreement, including a rate floor, rate  
 23                           cap, rate collar, cross-currency rate  
 24                           swap, and basis swap; a spot, same  
 25                           day-tomorrow, tomorrow-next, forward

1 or other foreign exchange agreement;  
2 a currency swap, option, future, or  
3 forward agreement; an equity index or  
4 equity swap, option, future, or for-  
5 ward agreement; a debt index or debt  
6 swap, option, future, or forward  
7 agreement; a credit swap, option, fu-  
8 ture, or forward agreement; a com-  
9 modity swap, option, future, or for-  
10 ward agreement or any other similar  
11 agreement;

12 “(II) means any combination of  
13 such agreements and any option to  
14 enter into any such agreement;

15 “(III) does not include any trans-  
16 action, no matter how documented,  
17 that is in substance a commercial,  
18 consumer, or industrial loan; and

19 “(IV) as defined in this clause  
20 shall not be construed or applied to  
21 challenge or affect the characteriza-  
22 tion, definition, or treatment of any  
23 swap agreement or any instrument de-  
24 fined as a swap agreement herein,  
25 under any other statute, regulation, or



1 rule, including, but not limited to, the  
2 Securities Act of 1933 (15 U.S.C. 77a  
3 et seq.), the Securities Exchange Act  
4 of 1934 (15 U.S.C. 78a et seq.), the  
5 Public Utility Holding Company Act  
6 of 1935 (15 U.S.C. 79a et seq.), the  
7 Trust Indenture Act of 1939 (15  
8 U.S.C. 77aa et seq.), the Investment  
9 Company Act of 1940 (15 U.S.C.  
10 80a–1 et seq.), the Investment Advis-  
11 ers Act of 1940 (15 U.S.C. 80b et  
12 seq.), the Securities Investor Protec-  
13 tion Act of 1970 (15 U.S.C. 78aaa et  
14 seq.), the Commodity Exchange Act  
15 (7 U.S.C. 1 et seq.), and the rules  
16 and regulations promulgated by the  
17 Securities and Exchange Commission  
18 or the Commodity Futures Trading  
19 Commission.”.

20 (g) DEFINITION OF TRANSFER.—Section  
21 11(e)(8)(D)(viii) of the Federal Deposit Insurance Act (12  
22 U.S.C. 1821(e)(8)(D)(viii)) is amended to read as follows:

23 “(viii) TRANSFER.—The term ‘trans-  
24 fer’ means every mode, direct or indirect,  
25 absolute or conditional, voluntary or invol-

1            untary, of disposing of or parting with  
2            property or with an interest in property,  
3            including retention of title as a security in-  
4            terest and foreclosure of the debtor’s eq-  
5            uity of redemption.”.

6            (h) TREATMENT OF QUALIFIED FINANCIAL CON-  
7            TRACTS.—Section 11(e)(8) of the Federal Deposit Insur-  
8            ance Act (12 U.S.C. 1821(e)(8)) is amended—

9            (1) in subparagraph (A), by striking “para-  
10            graph (10)” and inserting “paragraphs (9) and  
11            (10)”;

12            (2) in subparagraph (A)(i), by striking “to  
13            cause the termination or liquidation” and inserting  
14            “such person has to cause the termination, liquida-  
15            tion, or acceleration”;

16            (3) by amending subparagraph (A)(ii) to read  
17            as follows:

18                    “(ii) any right under any security  
19                    agreement or arrangement or other credit  
20                    enhancement related to 1 or more qualified  
21                    financial contracts described in clause  
22                    (i);” and

23            (4) by amending subparagraph (E)(ii) to read  
24            as follows:

1 “(ii) any right under any security  
 2 agreement or arrangement or other credit  
 3 enhancement related to 1 or more qualified  
 4 financial contracts described in clause  
 5 (i);”.

6 (i) AVOIDANCE OF TRANSFERS.—Section  
 7 11(e)(8)(C)(i) of the Federal Deposit Insurance Act (12  
 8 U.S.C. 1821(e)(8)(C)(i)) is amended by inserting “section  
 9 5242 of the Revised Statutes (12 U.S.C. 91) or any other  
 10 Federal or State law relating to the avoidance of pref-  
 11 erential or fraudulent transfers,” before “the Corpora-  
 12 tion”.

13 **SEC. 3. AUTHORITY OF THE CORPORATION WITH RESPECT**  
 14 **TO FAILED AND FAILING INSTITUTIONS.**

15 (a) Section 11(e)(8) of the Federal Deposit Insurance  
 16 Act (12 U.S.C. 1821(e)(8)) is amended—

17 (1) in subparagraph (E), by striking “other  
 18 than paragraph (12) of this subsection, subsection  
 19 (d)(9)” and inserting “other than subsections (d)(9)  
 20 and (d)(10)”; and

21 (2) by adding at the end the following new sub-  
 22 paragraphs:

23 “(F) CLARIFICATION.—No provision of law  
 24 shall be construed as limiting the right or  
 25 power of the Corporation, or authorizing any

1 court or agency to limit or delay, in any man-  
2 ner, the right or power of the Corporation to  
3 transfer any qualified financial contract in ac-  
4 cordance with paragraphs (9) and (10) of this  
5 subsection or to disaffirm or repudiate any such  
6 contract in accordance with subsection (e)(1) of  
7 this section.

8 “(G) WALKAWAY CLAUSES NOT EFPEC-  
9 TIVE.—Notwithstanding the provisions of sub-  
10 paragraphs (A) and (E), and sections 403 and  
11 404 of the Federal Deposit Insurance Corpora-  
12 tion Improvement Act of 1991 (12 U.S.C. 4403  
13 and 4404), no walkaway clause shall be enforce-  
14 able in a qualified financial contract of an in-  
15 sured depository institution in default. For pur-  
16 poses of this subparagraph, a ‘walkaway clause’  
17 is a provision in a qualified financial contract  
18 that, after calculation of a value of a party’s  
19 position or an amount due to or from 1 of the  
20 parties in accordance with its terms upon termi-  
21 nation, liquidation, or acceleration of the quali-  
22 fied financial contract, either does not create a  
23 payment obligation of a party or extinguishes a  
24 payment obligation of a party in whole or in

1           part solely because of such party’s status as a  
2           nondefaulting party.”.

3           (b) Section 11(e)(12)(A) of the Federal Deposit In-  
4           surance Act (12 U.S.C. 1821(e)(12)(A)) is amended by  
5           inserting “or the exercise of rights or powers” after “the  
6           appointment”.

7           **SEC. 4. AMENDMENTS RELATING TO TRANSFERS OF QUALI-**  
8                                   **FIED FINANCIAL CONTRACTS.**

9           (a) TRANSFERS OF QUALIFIED FINANCIAL CON-  
10          TRACTS TO FINANCIAL INSTITUTIONS.—Section 11(e)(9)  
11          of the Federal Deposit Insurance Act (12 U.S.C.  
12          1821(e)(9)) is amended to read as follows:

13                           “(9) TRANSFER OF QUALIFIED FINANCIAL CON-  
14          TRACTS.—

15                           “(A) IN GENERAL.—In making any trans-  
16          fer of assets or liabilities of a depository institu-  
17          tion in default which includes any qualified fi-  
18          nancial contract, the conservator or receiver for  
19          such depository institution shall either—

20                           “(i) transfer to 1 financial institution,  
21          other than a financial institution for which  
22          a conservator, receiver, trustee in bank-  
23          ruptcy, or other legal custodian has been  
24          appointed or which is otherwise the subject  
25          of a bankruptcy or insolvency proceeding—

1           “(I) all qualified financial con-  
2           tracts between any person or any af-  
3           filiate of such person and the deposi-  
4           tory institution in default;

5           “(II) all claims of such person or  
6           any affiliate of such person against  
7           such depository institution under any  
8           such contract (other than any claim  
9           which, under the terms of any such  
10          contract, is subordinated to the claims  
11          of general unsecured creditors of such  
12          institution);

13          “(III) all claims of such deposi-  
14          tory institution against such person or  
15          any affiliate of such person under any  
16          such contract; and

17          “(IV) all property securing any  
18          claim described in subclause (II) or  
19          (III) under any such contract, or any  
20          other credit enhancement for any con-  
21          tract described in clause (I); or

22          “(ii) transfer none of the qualified fi-  
23          nancial contracts, claims, or property re-  
24          ferred to in clause (i) (with respect to such  
25          person and any affiliate of such person).

1           “(B) TRANSFER TO FOREIGN BANK, FOR-  
2           EIGN FINANCIAL INSTITUTION, OR BRANCH OR  
3           AGENCY OF A FOREIGN BANK OR FINANCIAL IN-  
4           STITUTION.—In transferring any qualified fi-  
5           nancial contracts and related claims and prop-  
6           erty pursuant to subparagraph (A)(i), the con-  
7           servator or receiver for such depository institu-  
8           tion shall not make such transfer to a foreign  
9           bank, financial institution organized under the  
10          laws of a foreign country, or a branch or agency  
11          of a foreign bank or financial institution unless,  
12          under the law applicable to such bank, financial  
13          institution, branch or agency, to the qualified  
14          financial contracts, and to any netting contract,  
15          the contractual rights of the parties to such  
16          qualified financial contracts are enforceable  
17          substantially to the same extent as permitted  
18          under this section.

19          “(C) TRANSFER OF CONTRACTS SUBJECT  
20          TO THE RULES OF A CLEARING ORGANIZA-  
21          TION.—In the event that a conservator or re-  
22          ceiver transfers any qualified financial contract  
23          and related claims and property pursuant to  
24          subparagraph (A)(i) and such contract is sub-  
25          ject to the rules of a clearing organization, the

1 clearing organization shall not be required to  
 2 accept the transferee as a member by virtue of  
 3 the transfer.

4 “(D) DEFINITION.—For purposes of this  
 5 section, the term ‘financial institution’ means a  
 6 broker or dealer, a depository institution, a fu-  
 7 tures commission merchant, or any other insti-  
 8 tution as determined by the Corporation by reg-  
 9 ulation to be a financial institution.”.

10 (b) NOTICE TO QUALIFIED FINANCIAL CONTRACT  
 11 COUNTERPARTIES.—Section 11(e)(10)(A) of the Federal  
 12 Deposit Insurance Act (12 U.S.C. 1821(e)(10)(A)) is  
 13 amended by amending the flush material following clause  
 14 (ii) to read as follows: “the conservator or receiver shall  
 15 notify any person who is a party to any such contract of  
 16 such transfer by 5:00 p.m. (eastern time) on—

17 “(I) the business day following  
 18 the date of the appointment of the re-  
 19 ceiver, in the case of a receivership; or

20 “(II) the business day following  
 21 such transfer in the case of a con-  
 22 servatorship.”.

23 (c) RIGHTS AGAINST RECEIVER AND TREATMENT OF  
 24 BRIDGE BANKS.—Section 11(e)(10) of the Federal De-



1   posit Insurance Act (12 U.S.C. 1821(e)(10)) is further  
2   amended—

3           (1) by redesignating subparagraph (B) as sub-  
4   paragraph (D); and

5           (2) by inserting after subparagraph (A) the fol-  
6   lowing new subparagraphs:

7           “(B) CERTAIN RIGHTS NOT ENFORCE-  
8   ABLE.—

9           “(i) RECEIVERSHIP.—A person who is  
10          a party to a qualified financial contract  
11          with an insured depository institution may  
12          not exercise any right such person has to  
13          terminate, liquidate, or net such contract  
14          under paragraph (8)(A) or section 403 or  
15          404 of the Federal Deposit Insurance Cor-  
16          poration Improvement Act of 1991 solely  
17          by reason of or incidental to the appoint-  
18          ment of a receiver for the depository insti-  
19          tution (or the insolvency or financial condi-  
20          tion of the depository institution for which  
21          the receiver has been appointed)—

22                  “(I) until 5:00 p.m. (eastern  
23                  time) on the business day following  
24                  the date of the appointment of the re-  
25                  ceiver; or

1                   “(II) after the person has re-  
2                   ceived notice that the contract has  
3                   been transferred pursuant to para-  
4                   graph (9)(A).

5                   “(ii) CONSERVATORSHIP.—A person  
6                   who is a party to a qualified financial con-  
7                   tract with an insured depository institution  
8                   may not exercise any right such person has  
9                   to terminate, liquidate, or net such con-  
10                  tract under paragraph (8)(E) or sections  
11                  403 or 404 of the Federal Deposit Insur-  
12                  ance Corporation Improvement Act of  
13                  1991, solely by reason of or incidental to  
14                  the appointment of a conservator for the  
15                  depository institution (or the insolvency or  
16                  financial condition of the depository insti-  
17                  tution for which the conservator has been  
18                  appointed).

19                  “(iii) NOTICE.—For purposes of this  
20                  subsection, the Corporation as receiver or  
21                  conservator of an insured depository insti-  
22                  tution shall be deemed to have notified a  
23                  person who is a party to a qualified finan-  
24                  cial contract with such depository institu-  
25                  tion if the Corporation has taken steps

1 reasonably calculated to provide notice to  
2 such person by the time specified in sub-  
3 paragraph (A) of this subsection.

4 “(C) TREATMENT OF BRIDGE BANKS.—

5 The following institutions shall not be consid-  
6 ered a financial institution for which a con-  
7 servator, receiver, trustee in bankruptcy, or  
8 other legal custodian has been appointed or  
9 which is otherwise the subject of a bankruptcy  
10 or insolvency proceeding for purposes of sub-  
11 section (e)(9)—

12 “(i) a bridge bank; or

13 “(ii) a depository institution organized  
14 by the Corporation, for which a conserva-  
15 tor is appointed either—

16 “(I) immediately upon the orga-  
17 nization of the institution; or

18 “(II) at the time of a purchase  
19 and assumption transaction between  
20 such institution and the Corporation  
21 as receiver for a depository institution  
22 in default.”.

1 **SEC. 5. AMENDMENTS RELATING TO DISAFFIRMANCE OR**  
2 **REPUDIATION OF QUALIFIED FINANCIAL**  
3 **CONTRACTS.**

4 Section 11(e) of the Federal Deposit Insurance Act  
5 (12 U.S.C. 1821(e)) is further amended—

6 (1) by redesignating paragraphs (11) through  
7 (15) as paragraphs (12) through (16), respectively;  
8 and

9 (2) by inserting after paragraph (10) the fol-  
10 lowing new paragraph:

11 “(11) DISAFFIRMANCE OR REPUDIATION OF  
12 QUALIFIED FINANCIAL CONTRACTS.—In exercising  
13 its rights of disaffirmance or repudiation with re-  
14 spect to any qualified financial contract to which  
15 such institution is a party, the conservator or re-  
16 ceiver for such institution shall either—

17 “(A) disaffirm or repudiate all qualified fi-  
18 nancial contracts between—

19 “(i) any person or any affiliate of  
20 such person; and

21 “(ii) the depository institution in de-  
22 fault; or

23 “(B) disaffirm or repudiate none of the  
24 qualified financial contracts referred to in sub-  
25 paragraph (A) (with respect to such person or  
26 any affiliate of such person).”.

1 **SEC. 6. CLARIFYING AMENDMENT RELATING TO MASTER**  
2 **AGREEMENTS.**

3 Section 11(e)(8)(D)(vii) of the Federal Deposit In-  
4 surance Act (12 U.S.C. 1821(e)(8)(D)(vii)) is amended to  
5 read as follows:

6 “(vii) TREATMENT OF MASTER  
7 AGREEMENT AS 1 AGREEMENT.—Any mas-  
8 ter agreement for any contract or agree-  
9 ment described in any preceding clause of  
10 this subparagraph (or any master agree-  
11 ment for such master agreement or agree-  
12 ments), together with all supplements to  
13 such master agreement, shall be treated as  
14 a single agreement and a single qualified  
15 financial contract. If a master agreement  
16 contains provisions relating to agreements  
17 or transactions that are not themselves  
18 qualified financial contracts, the master  
19 agreement shall be deemed to be a quali-  
20 fied financial contract only with respect to  
21 those transactions that are themselves  
22 qualified financial contracts.”.

1 **SEC. 7. FEDERAL DEPOSIT INSURANCE CORPORATION IM-**  
2 **PROVEMENT ACT OF 1991.**

3 (a) DEFINITIONS.—Section 402 of the Federal De-  
4 posit Insurance Corporation Improvement Act of 1991 (12  
5 U.S.C. 4402) is amended—

6 (1) in paragraph (6)—

7 (A) by redesignating subparagraphs (B)  
8 through (D) as subparagraphs (C) through (E),  
9 respectively;

10 (B) by inserting after subparagraph (A)  
11 the following new subparagraph:

12 “(B) an uninsured national bank or an un-  
13 insured State bank that is a member of the  
14 Federal Reserve System if the national bank or  
15 State member bank is not eligible to make ap-  
16 plication to become an insured bank under sec-  
17 tion 5 of the Federal Deposit Insurance Act (12  
18 U.S.C. 1815);”; and

19 (C) by amending subparagraph (C) (as re-  
20 designated) to read as follows:

21 “(C) a branch or agency of a foreign bank,  
22 a foreign bank and any branch or agency of the  
23 foreign bank, or the foreign bank that estab-  
24 lished the branch or agency, as those terms are  
25 defined in section 1(b) of the International  
26 Banking Act of 1978 (12 U.S.C. 3101);”;

1           (2) in paragraph (11), by adding before the pe-  
2       riod “and any other clearing organization with which  
3       such clearing organization has a netting contract”;

4           (3) by amending paragraph (14)(A)(i) to read  
5       as follows:

6                       “(i) means a contract or agreement  
7                       between 2 or more financial institutions,  
8                       clearing organizations, or members that  
9                       provides for netting present or future pay-  
10                      ment obligations or payment entitlements  
11                      (including liquidation or closeout values re-  
12                      lating to such obligations or entitlements)  
13                      among the parties to the agreement; and”;  
14                      and

15           (4) by adding at the end the following new  
16       paragraph:

17                       “(15) PAYMENT.—The term ‘payment’ means a  
18                       payment of United States dollars, another currency,  
19                       or a composite currency, and a noncash delivery, in-  
20                       cluding a payment or delivery to liquidate an  
21                       unmatured obligation.”.

22       (b) ENFORCEABILITY OF BILATERAL NETTING CON-  
23       TRACTS.—Section 403 of the Federal Deposit Insurance  
24       Corporation Improvement Act of 1991 (12 U.S.C. 4403)  
25       is amended—

1           (1) by amending subsection (a) to read as fol-  
2       lows:

3       “(a) GENERAL RULE.—Notwithstanding any other  
4       provision of State or Federal law (other than paragraphs  
5       (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal  
6       Deposit Insurance Act (12 U.S.C. 1821(e)) or any order  
7       authorized under section 5(b)(2) of the Securities Investor  
8       Protection Act of 1971 (15 U.S.C. 78eee(b)(2))), the cov-  
9       ered contractual payment obligations and the covered con-  
10      tractual payment entitlements between any 2 financial in-  
11      stitutions shall be netted in accordance with, and subject  
12      to the conditions of, the terms of any applicable netting  
13      contract.”; and

14           (2) by adding at the end the following new sub-  
15      section:

16      “(f) ENFORCEABILITY OF SECURITY AGREE-  
17      MENTS.—The provisions of any security agreement or ar-  
18      rangement or other credit enhancement related to 1 or  
19      more netting contracts between any 2 financial institu-  
20      tions shall be enforceable in accordance with their terms  
21      and shall not be stayed, avoided, or otherwise limited by  
22      any State or Federal law (other than paragraphs (8)(E),  
23      (8)(F), and (10)(B) of section 11(e) of the Federal De-  
24      posit Insurance Act (12 U.S.C. 1821(e)) and section



1 5(b)(2) of the Securities Investor Protection Act of 1971  
2 (15 U.S.C. 78eee(b)(2))).”.

3 (c) ENFORCEABILITY OF CLEARING ORGANIZATION  
4 NETTING CONTRACTS.—Section 404 of the Federal De-  
5 posit Insurance Corporation Improvement Act of 1991 (12  
6 U.S.C. 4404) is amended—

7 (1) by amending subsection (a) to read as fol-  
8 lows:

9 “(a) GENERAL RULE.—Notwithstanding any other  
10 provision of State or Federal law (other than paragraphs  
11 (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal  
12 Deposit Insurance Act (12 U.S.C. 1821(e)) and any order  
13 authorized under section 5(b)(2) of the Securities Investor  
14 Protection Act of 1971 (15 U.S.C. 78eee(b)(2))), the cov-  
15 ered contractual payment obligations and the covered con-  
16 tractual payment entitlements of a member of a clearing  
17 organization to and from all other members of a clearing  
18 organization shall be netted in accordance with and sub-  
19 ject to the conditions of any applicable netting contract.”;  
20 and

21 (2) by adding at the end the following new sub-  
22 section:

23 “(h) ENFORCEABILITY OF SECURITY AGREE-  
24 MENTS.—The provisions of any security agreement or ar-  
25 rangement or other credit enhancement related to 1 or

1 more netting contracts between any 2 members of a clear-  
 2 ing organization shall be enforceable in accordance with  
 3 their terms and shall not be stayed, avoided, or otherwise  
 4 limited by any State or Federal law other than paragraphs  
 5 (8)(E), (8)(F), and (10)(B) of section 11(e) of the Federal  
 6 Deposit Insurance Act (12 U.S.C. 1821(e)) and section  
 7 5(b)(2) of the Securities Investor Protection Act of 1971  
 8 (15 U.S.C. 78eee(b)(2)).”.

9 (d) ENFORCEABILITY OF CONTRACTS WITH UNIN-  
 10 SURED NATIONAL BANKS AND UNINSURED FEDERAL  
 11 BRANCHES AND AGENCIES.—The Federal Deposit Insur-  
 12 ance Corporation Improvement Act of 1991 (12 U.S.C.  
 13 4401 et seq.) is amended—

14 (1) by redesignating section 407 as section 408;  
 15 and

16 (2) by adding after section 406 the following  
 17 new section:

18 **“SEC. 407. TREATMENT OF CONTRACTS WITH UNINSURED**  
 19 **NATIONAL BANKS AND UNINSURED FEDERAL**  
 20 **BRANCHES AND AGENCIES.**

21 “(a) IN GENERAL.—Notwithstanding any other pro-  
 22 vision of law, paragraphs (8), (9), and (11) of section  
 23 11(e) of the Federal Deposit Insurance Act (12 U.S.C.  
 24 1821(e)) shall apply to an uninsured national bank or un-  
 25 insured Federal branch or Federal agency except—

1           “(1) any reference to the ‘Corporation as re-  
2           ceiver’ or ‘the receiver or the Corporation’ shall refer  
3           to the receiver of an uninsured national bank or un-  
4           insured Federal branch or Federal agency appointed  
5           by the Comptroller of the Currency;

6           “(2) any reference to the ‘Corporation’ (other  
7           than in section 11(e)(8)(D) of such Act), the ‘Cor-  
8           poration, whether acting as such or as conservator  
9           or receiver’, a ‘receiver’, or a ‘conservator’ shall refer  
10          to the receiver or conservator of an uninsured na-  
11          tional bank or uninsured Federal branch or Federal  
12          agency appointed by the Comptroller of the Cur-  
13          rency; and

14          “(3) any reference to an ‘insured depository in-  
15          stitution’ or ‘depository institution’ shall refer to an  
16          uninsured national bank or an uninsured Federal  
17          branch or Federal agency.

18          “(b) LIABILITY.—The liability of a receiver or con-  
19          servator of an uninsured national bank or uninsured Fed-  
20          eral branch or agency shall be determined in the same  
21          manner and subject to the same limitations that apply to  
22          receivers and conservators of insured depository institu-  
23          tions under section 11(e) of the Federal Deposit Insurance  
24          Act (12 U.S.C. 1821(e)).

25          “(c) REGULATORY AUTHORITY.—

1           “(1) IN GENERAL.—The Comptroller of the  
 2       Currency, in consultation with the Federal Deposit  
 3       Insurance Corporation, may promulgate regulations  
 4       to implement this section.

5           “(2) SPECIFIC REQUIREMENT.—In promulgat-  
 6       ing regulations to implement this section, the Comp-  
 7       troller of the Currency shall ensure that the regula-  
 8       tions generally are consistent with the regulations  
 9       and policies of the Federal Deposit Insurance Cor-  
 10      poration adopted pursuant to the Federal Deposit  
 11      Insurance Act.

12          “(d) DEFINITIONS.—For purposes of this section, the  
 13      terms ‘Federal branch’, ‘Federal agency’, and ‘foreign  
 14      bank’ have the same meaning as in section 1(b) of the  
 15      International Banking Act (12 U.S.C. 3101).”.

16      **SEC. 8. BANKRUPTCY CODE AMENDMENTS.**

17          (a) DEFINITIONS OF SWAP AGREEMENT, SECURITIES  
 18      CONTRACT, FORWARD CONTRACT, COMMODITY CON-  
 19      TRACT, AND REPURCHASE AGREEMENT.—Title 11,  
 20      United States Code, is amended—

21              (1) in section 101—

22                      (A) in paragraph (25)—

23                              (i) by striking “repurchase trans-  
 24                              action, reverse repurchase transaction”;

1 (ii) by inserting “repurchase agree-  
2 ment” after “but not limited to, a”; and

3 (iii) by inserting before the semicolon  
4 “, or any other similar agreement, and a  
5 security agreement or arrangement or  
6 other credit enhancement related to 1 or  
7 more of the foregoing”;

8 (B) by amending paragraph (47) to read  
9 as follows:

10 “(47) ‘repurchase agreement’ (which definition  
11 also applies to a reverse repurchase agreement)—

12 “(A) means—

13 “(i) an agreement, including related  
14 terms, which provides for the transfer of  
15 certificates of deposit, eligible bankers’ ac-  
16 ceptances, qualified foreign government se-  
17 curities or securities that are direct obliga-  
18 tions of, or that are fully guaranteed as to  
19 principal and interest by, the United  
20 States or any agency of the United States  
21 against the transfer of funds by the trans-  
22 feree of such certificates of deposit, eligible  
23 bankers’ acceptances, or securities with a  
24 simultaneous agreement by such transferee  
25 to transfer to the transferor thereof certifi-

cates of deposit, eligible bankers' acceptances, or securities as described above, at a date certain not later than 1 year after such transfers or on demand, against the transfer of funds; or any other similar agreement; and

“(ii) a security agreement or arrangement or other credit enhancement related to 1 or more of the foregoing; and

“(B) does not include any participation in or servicing agreement for a commercial mortgage loan.

For purposes of this paragraph, a ‘qualified foreign government security’ means a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development.”; and

(C) by amending paragraph (53B) to read as follows:

“(53B) ‘swap agreement’—

“(A) means—

“(i) any agreement, including the terms and conditions incorporated by reference in any such agreement, which is an interest rate swap, option, future, or for-

ward agreement, including a rate floor,  
rate cap, rate collar, cross-currency rate  
swap, and basis swap; a spot, same day-to-  
morrow, tomorrow-next, forward, or other  
foreign exchange agreement; a currency  
swap, option, future, or forward agree-  
ment; an equity index or equity swap, op-  
tion, future, or forward agreement; a debt  
index or debt swap, option, future, or for-  
ward agreement; a credit swap, option, fu-  
ture, or forward agreement; a commodity  
swap, option, future, or forward agree-  
ment; or any other similar agreement; and

“(ii) any combination of such agree-  
ments and any option to enter into any  
such agreement, and any security agree-  
ment or arrangement or other credit en-  
hancement related to 1 or more of the  
foregoing;

“(B) does not include any transaction, no  
matter how documented, that is in substance a  
commercial, consumer, or industrial loan; and

“(C) such definition is applicable for pur-  
poses of this title only and shall not be con-  
strued or applied to challenge or affect the

1 characterization, definition, or treatment of any  
2 swap agreement or any instrument defined as a  
3 swap agreement herein, under any other statute,  
4 regulation, or rule, including but not limited to,  
5 the Securities Act of 1933 (15 U.S.C. 77a et seq.),  
6 the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),  
7 the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a  
8 et seq.), the Trust Indenture Act of 1939 (15  
9 U.S.C. 77aa et seq.), the Investment Company  
10 Act of 1940 (15 U.S.C. 80a–1 et seq.), the Investment  
11 Advisers Act of 1940 (15 U.S.C. 80b et seq.), the  
12 Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.),  
13 the Commodity Exchange Act (7 U.S.C. 1 et seq.), and  
14 the rules and regulations promulgated by the  
15 Securities and Exchange Commission or the  
16 Commodity Futures Trading Commission.”;

17 (2) by amending section 741(7) to read as follows:

18  
19  
20

21 “(7) ‘securities contract’—

22 “(A) means a contract for the purchase,  
23 sale, or loan of a security, including an option  
24 for the purchase or sale of a security, certificate  
25 of deposit, or group or index of securities (in-



cluding any interest therein or based on the value thereof) or any option entered into on a national securities exchange relating to foreign currencies, or the guarantee of any settlement of cash or securities by or to a securities clearing agency, or any other similar agreement; and

“(B) does not include—

“(i) any participation in or servicing agreement for a commercial mortgage loan;

or

“(ii) an agreement that provides for the transfer of securities against the transfer of funds by the transferee of such securities with a simultaneous agreement by such transferee to transfer to the transferor thereof securities against the transfer of funds; provided, however, the exclusion contained in this clause does not apply to any such agreement for the transfer of the types of securities referred to in section 101(47) against funds so long as the simultaneous agreement provides for the transfer of funds against such securities within 1 year of the transfer of such securities.”; and

1 (3) in section 761(4)—

2 (A) by striking “or” at the end of subpara-  
3 graph (D);

4 (B) by inserting “or” at the end of sub-  
5 paragraph (E); and

6 (C) by adding at the end the following new  
7 subparagraph:

8 “(F) or any other similar agreement, and  
9 a security agreement or arrangement or other  
10 credit enhancement related to 1 or more of the  
11 foregoing;”.

12 (b) DEFINITIONS OF FINANCIAL INSTITUTION AND  
13 FORWARD CONTRACT MERCHANT.—Section 101 of title  
14 11, United States Code, is amended—

15 (1) by amending paragraph (22) to read as fol-  
16 lows:

17 “(22) ‘financial institution’ means a Federal  
18 Reserve Bank, or a person that is a commercial or  
19 savings bank, industrial savings bank, savings and  
20 loan association, trust company, or receiver or con-  
21 servator for such person and, when any such Federal  
22 Reserve Bank, receiver, or conservator or person act-  
23 ing as agent or custodian for a customer in connec-  
24 tion with a securities contract, as defined in section  
25 741(7) of this title, such customer;” and

1           (2) by amending paragraph (26) to read as fol-  
2       lows:—

3           “(26) ‘forward contract merchant’ means a  
4       Federal Reserve Bank, or a person whose business  
5       consists in whole or in part of entering into forward  
6       contracts as or with merchants or in a commodity,  
7       as defined or in section 761(8) of this title, or any  
8       similar good, article, service, right, or interest which  
9       is presently or in the future becomes the subject of  
10      dealing or in the forward contract trade;”.

11      (c) DEFINITION OF MASTER NETTING AGREEMENT  
12      AND MASTER NETTING AGREEMENT PARTICIPANT.—Sec-  
13      tion 101 of title 11, United States Code, is amended by  
14      inserting after paragraph (38) the following new para-  
15      graphs:

16           “(38A) ‘master netting agreement’ means an  
17      agreement providing for the exercise of rights, in-  
18      cluding rights of netting, setoff, liquidation, termi-  
19      nation, acceleration, or closeout, under or in connec-  
20      tion with 1 or more contracts that are described in  
21      any 1 or more of paragraphs (1) through (5) of sec-  
22      tion 561(a), or any security agreement or arrange-  
23      ment or other credit enhancement related to 1 or  
24      more of the foregoing. If a master netting agreement  
25      contains provisions relating to agreements or trans-

1 actions that are not contracts described in para-  
 2 graphs (1) through (5) of section 561(a), the master  
 3 netting agreement shall be deemed to be a master  
 4 netting agreement only with respect to those agree-  
 5 ments or transactions that are described in any 1 or  
 6 more of the paragraphs (1) through (5) of section  
 7 561(a);

8 “(38B) ‘master netting agreement participant’  
 9 means an entity that, at any time before the filing  
 10 of the petition, is a party to an outstanding master  
 11 netting agreement with the debtor;”.

12 (d) SWAP AGREEMENTS, SECURITIES CONTRACTS,  
 13 COMMODITY CONTRACTS, FORWARD CONTRACTS, REPUR-  
 14 CHASE AGREEMENTS, AND MASTER NETTING AGREE-  
 15 MENTS UNDER THE AUTOMATIC-STAY.—Section 362(b)  
 16 of title 11, United States Code, is amended—

17 (1) in paragraph (6), by inserting “, pledged to,  
 18 and under the control of,” after “held by”;

19 (2) in paragraph (7), by inserting “, pledged to,  
 20 and under the control of,” after “held by”;

21 (3) by amending paragraph (17) to read as fol-  
 22 lows:

23 “(17) under subsection (a), of the setoff by a  
 24 swap participant of any mutual debt and claim  
 25 under or in connection with any swap agreement

1 that constitutes the setoff of a claim against the  
 2 debtor for any payment due from the debtor under  
 3 or in connection with any swap agreement against  
 4 any payment due to the debtor from the swap par-  
 5 ticipant under or in connection with any swap agree-  
 6 ment or against cash, securities, or other property of  
 7 the debtor held by, pledged to, and under the control  
 8 of, or due from such swap participant to guarantee,  
 9 secure, or settle any swap agreement;”;

10 (4) in paragraph (18), by striking the period  
 11 and inserting “; or”; and

12 (5) by inserting after paragraph (18) the fol-  
 13 lowing new paragraph:

14 “(19) under subsection (a), of the setoff by a  
 15 master netting agreement participant of a mutual  
 16 debt and claim under or in connection with a master  
 17 netting agreement to the extent such participant  
 18 could offset the claim under paragraph (6), (7), or  
 19 (17) for each individual contract covered by the mas-  
 20 ter netting agreement in issue.”.

21 (e) LIMITATION OF AVOIDANCE POWERS UNDER  
 22 MASTER NETTING AGREEMENT.—Section 546 of title 11,  
 23 United States Code, is amended—

24 (1) in subsection (g) (as added by section 103  
 25 of Public Law 101–311)—

1 (A) by striking “under a swap agreement”;

2 (B) by striking “in connection with a swap  
3 agreement” and inserting “under or in connec-  
4 tion with any swap agreement”;

5 (2) by redesignating subsection (g) (as added  
6 by section 222(a) of Public Law 103–394) as sub-  
7 section (i); and

8 (3) by inserting before subsection (i) (as redes-  
9 ignated) the following new subsection:

10 “(h) Notwithstanding sections 544, 545, 547,  
11 548(a)(2), and 548(b) of this title, to the extent that  
12 under subsection (e), (f), or (g), the trustee may not avoid  
13 a transfer made by or to a master netting agreement par-  
14 ticipant under or in connection with each individual con-  
15 tract covered by any master netting agreement that is  
16 made before the commencement of the case, the trustee  
17 may not avoid a transfer made by or to such master net-  
18 ting agreement participant under or in connection with the  
19 master netting agreement in issue, except under section  
20 548(a)(1) of this title.”.

21 (f) FRAUDULENT TRANSFERS OF MASTER NETTING  
22 AGREEMENTS.—Section 548(d)(2) of title 11, United  
23 States Code, is amended—

24 (1) in subparagraph (C), by striking “and”;

1           (2) in subparagraph (D), by striking the period  
2           and inserting “; and”; and

3           (3) by adding at the end the following new sub-  
4           paragraph:

5                   “(E) a master netting agreement partici-  
6           pant that receives a transfer in connection with  
7           a master netting agreement takes for value to  
8           the extent of such transfer, but only to the ex-  
9           tent that such participant would take for value  
10          under paragraph (B), (C), or (D) for each indi-  
11          vidual contract covered by the master netting  
12          agreement in issue.”.

13          (g) TERMINATION OR ACCELERATION OF SECURITIES  
14          CONTRACTS.—Section 555 of title 11, United States Code,  
15          is amended—

16               (1) by amending the section heading to read  
17               **“Contractual right to liquidate, termi-**  
18               **nate, or accelerate a securities contract”**;  
19               and

20               (2) in the first sentence, by striking “liquida-  
21               tion” and inserting “liquidation, termination, or ac-  
22               celeration”.

23          (h) TERMINATION OR ACCELERATION OF COMMOD-  
24          ITIES OR FORWARD CONTRACTS.—Section 556 of title 11,  
25          United States Code, is amended—

1 (1) by amending the section heading to read  
2 **“Contractual right to liquidate, termi-**  
3 **nate, or accelerate a commodities con-**  
4 **tract or forward contract”**; and

5 (2) in the first sentence, by striking “liquida-  
6 tion” and inserting “liquidation, termination, or ac-  
7 celeration”.

8 (i) TERMINATION OR ACCELERATION OF REPUR-  
9 CHASE AGREEMENTS.—Section 559 of title 11, United  
10 States Code, is amended—

11 (1) by amending the section heading to read  
12 **“Contractual right to liquidate, termi-**  
13 **nate, or accelerate a repurchase agree-**  
14 **ment”**; and

15 (2) in the first sentence, by striking “liquida-  
16 tion” and inserting “liquidation, termination, or ac-  
17 celeration”.

18 (j) LIQUIDATION, TERMINATION, OR ACCELERATION  
19 OF SWAP AGREEMENTS.—Section 560 of title 11, United  
20 States Code, is amended—

21 (1) by amending the section heading to read  
22 **“Contractual right to liquidate, termi-**  
23 **nate, or accelerate a swap agreement”**;  
24 and



1           (2) in the first sentence, by striking “termi-  
 2           nation of a swap agreement” and inserting “liquida-  
 3           tion, termination, or acceleration of 1 or more swap  
 4           agreements”; and

5           (3) by striking “in connection with any swap  
 6           agreement” and inserting “in connection with the  
 7           termination, liquidation, or acceleration of 1 or more  
 8           swap agreements”.

9           (k) LIQUIDATION, TERMINATION, ACCELERATION, OR  
 10          OFFSET UNDER A MASTER NETTING AGREEMENT AND  
 11          ACROSS CONTRACTS.—Title 11, United States Code, is  
 12          amended by inserting after section 560 the following new  
 13          section:

14       **“§ 561. Contractual right to terminate, liquidate, ac-**  
 15                       **celerate, or offset under a master netting**  
 16                       **agreement and across contracts**

17       “(a) IN GENERAL.—Subject to subsection (b), the ex-  
 18       ercise of any contractual right, because of a condition of  
 19       the kind specified in section 365(e)(1), to cause the termi-  
 20       nation, liquidation, or acceleration of or to offset, or net  
 21       termination values, payment amounts or other transfer ob-  
 22       ligations arising under or in connection with the termi-  
 23       nation, liquidation, or acceleration of 1 or more—

24               “(1) securities contracts, as defined in section  
 25       741(7);

1           “(2) commodity contracts, as defined in section  
2       761(4);

3           “(3) forward contracts;

4           “(4) repurchase agreements;

5           “(5) swap agreements; or

6           “(6) master netting agreements,

7 shall not be stayed, avoided, or otherwise limited by oper-  
8 ation of any provision of this title or by any order of a  
9 court or administrative agency in any proceeding under  
10 this title.

11       “(b) EXCEPTION.—

12           “(1) A party may exercise a contractual right  
13 described in subsection (a) to terminate, liquidate, or  
14 accelerate only to the extent that such party could  
15 exercise such a right under section 555, 556, 559,  
16 or 560 for each individual contract covered by the  
17 master netting agreement in issue.

18           “(2)(A) A party may not exercise a contractual  
19 right described in subsection (a) to offset or to net  
20 obligations arising under, or in connection with, a  
21 commodity contract against obligations arising  
22 under, or in connection with, any instrument listed  
23 in subsection (a) if the obligations are not mutual.

24           “(B) If a debtor is a commodity broker subject  
25 to subchapter IV of chapter 7 of this title, a party

1        may not net or offset an obligation to the debtor  
 2        arising under, or in connection with, a commodity  
 3        contract against any claim arising under, or in con-  
 4        nection with, other instruments listed in subsection  
 5        (a) if the party has no positive net equity in the  
 6        commodity account at the debtor, as calculated  
 7        under subchapter IV.

8        “(c) DEFINITION.—As used in this section, the term  
 9        ‘contractual right’ includes, but is not limited to, a right  
 10       set forth in a rule or bylaw of a national securities ex-  
 11       change, a national securities association, or a securities  
 12       clearing agency, a right set forth in a bylaw of a clearing  
 13       organization or contract market or in a resolution of the  
 14       governing board thereof, and a right whether or not evi-  
 15       denced in writing arising under common law, under law  
 16       merchant, or by reason of normal business practice.”.

17        (l) MUNICIPAL BANKRUPTCIES.—Section 901 of title  
 18       11, United States Code, is amended—

19                (1) by inserting “, 555, 556” after “553”; and

20                (2) by inserting “, 559, 560, 561, 562” after  
 21        “557”.

22        (m) ANCILLARY PROCEEDINGS.—Section 304 of title  
 23       11, United States Code, is amended by adding at the end  
 24       the following new subsection:

1       “(d) Any provisions of this title relating to securities  
 2 contracts, commodity contracts, forward contracts, repur-  
 3 chase agreements, swap agreements, or master netting  
 4 agreements shall apply in a case ancillary to a foreign pro-  
 5 ceeding under this section.”.

6       (n) COMMODITY BROKER LIQUIDATIONS.—Title 11,  
 7 United States Code, is amended by inserting after section  
 8 766 the following new section:

9       **“§ 767. Commodity broker liquidation and forward**  
 10               **contract merchants, commodity brokers,**  
 11               **stockbrokers, financial institutions, secu-**  
 12               **rities clearing agencies, swap partici-**  
 13               **pants, repo participants, and master net-**  
 14               **ting agreement participants**

15       “Notwithstanding any other provision of this title,  
 16 the exercise of rights by a forward contract merchant,  
 17 commodity broker, stockbroker, financial institution, secu-  
 18 rities clearing agency, swap participant, repo participant,  
 19 or master netting agreement participant under this title  
 20 shall not affect the priority of any unsecured claim it may  
 21 have after the exercise of such rights or affect the provi-  
 22 sions of this subchapter IV regarding customer property  
 23 or distributions.”.

1 (o) STOCKBROKER LIQUIDATIONS.—Title 11, United  
 2 States Code, is amended by inserting after section 752 the  
 3 following new section:

4 **“§ 753. Stockbroker liquidation and forward contract**  
 5 **merchants, commodity brokers, stock-**  
 6 **brokers, financial institutions, securities**  
 7 **clearing agencies, swap participants,**  
 8 **repo participants, and master netting**  
 9 **agreement participants**

10 “Notwithstanding any other provision of this title,  
 11 the exercise of rights by a forward contract merchant,  
 12 commodity broker, stockbroker, financial institution, secu-  
 13 rities clearing agency, swap participant, repo participant,  
 14 or master netting agreement participant under this title  
 15 shall not affect the priority of any unsecured claim it may  
 16 have after the exercise of rights or affect the provisions  
 17 of this subchapter III regarding customer property or dis-  
 18 tributions.”.

19 (p) SETOFF.—Section 553 of title 11, United States  
 20 Code, is amended—

21 (1) in subsection (a)(3)(C), by inserting “(ex-  
 22 cept for a setoff of a kind described in section  
 23 362(b)(6), 362(b)(7), 362(b)(17), 555, 556, 559,  
 24 560, or 561 of this title)” before the period; and

1           (2) in subsection (b)(1), by striking  
 2           “362(b)(14),” and inserting “362(b)(17), 555, 556,  
 3           559, 560, 561”.

4 **SEC. 9. RECORDKEEPING REQUIREMENTS.**

5           Section 11(e)(8) of the Federal Deposit Insurance  
 6 Act (12 U.S.C. 1821(e)(8)) is amended by adding at the  
 7 end the following new subparagraph:

8                   “(H) RECORDKEEPING REQUIREMENTS.—  
 9           The Corporation, in consultation with the ap-  
 10          propriate Federal banking agencies, may pre-  
 11          scribe regulations requiring more detailed rec-  
 12          ordkeeping with respect to qualified financial  
 13          contracts (including market valuations) by in-  
 14          sured depository institutions.”.

15 **SEC. 10. EXEMPTIONS FROM CONTEMPORANEOUS EXECU-**  
 16 **TION REQUIREMENT.**

17          Section 13(e)(2) of the Federal Deposit Insurance  
 18 Act (12 U.S.C. 1823(e)(2)) is amended to read as follows:

19                   “(2) EXEMPTIONS FROM CONTEMPORANEOUS  
 20          EXECUTION REQUIREMENT.—An agreement to pro-  
 21          vide for the lawful collateralization of—

22                   “(A) deposits of, or other credit extension  
 23          by, a Federal, State, or local governmental en-  
 24          tity, or of any depositor referred to in section

1           11(a)(2), including an agreement to provide col-  
2           lateral in lieu of a surety bond;

3           “(B) bankruptcy estate funds pursuant to  
4           section 345(b)(2) of title 11, United States  
5           Code;

6           “(C) extensions of credit, including any  
7           overdraft, from a Federal Reserve Bank or  
8           Federal Home Loan Bank; or

9           “(D) 1 or more qualified financial con-  
10          tracts, as defined in section 11(e)(8)(D),  
11          shall not be deemed invalid pursuant to paragraph  
12          (1)(B) solely because such agreement was not exe-  
13          cuted contemporaneously with the acquisition of the  
14          collateral or because of pledges, delivery, or substi-  
15          tution of the collateral made in accordance with such  
16          agreement.”.

17 **SEC. 11. DAMAGE MEASURE.**

18          (a) Title 11, United States Code, is amended by in-  
19          serting after section 561 (as added by section 7(k)) the  
20          following new section:

1 **“§ 562. Damage measure in connection with swap**  
 2 **agreements, securities contracts, forward**  
 3 **contracts, commodity contracts, repur-**  
 4 **chase agreements, or master netting**  
 5 **agreements**

6 “If the trustee rejects a swap agreement, securities  
 7 contract as defined in section 741 of this title, forward  
 8 contract, repurchase agreement, or master netting agree-  
 9 ment pursuant to section 365(a) of this title, or if a for-  
 10 ward contract merchant, stockbroker, financial institution,  
 11 securities clearing agency, repo participant, master net-  
 12 ting agreement participant, or swap participant liquidates,  
 13 terminates, or accelerates any such contract or agreement,  
 14 damages shall be measured as of the earlier of—

15 “(1) the date of such rejection; or

16 “(2) the date of such liquidation, termination,  
 17 or acceleration.”.

18 (b) Section 502(g) of title 11, United States Code  
 19 is amended—

20 (1) by designating the existing text as para-  
 21 graph (1); and

22 (2) by adding at the end the following new  
 23 paragraph:

24 “(2) A claim for damages calculated in accord-  
 25 ance with section 562 of this title shall be allowed  
 26 under subsection (a), (b), or (c) of this section or



1 disallowed under subsection (d) or (e) of this section  
2 as if such claim had arisen before the date of the fil-  
3 ing of the petition.”.

4 **SEC. 12. SIPC STAY.**

5 Section 5(b)(2) of the Securities Investor Protection  
6 Act of 1971 (15 U.S.C. 78eee(b)(2)) is amended by adding  
7 after subparagraph (B) the following new subparagraph:

8 “(C) EXCEPTION FROM STAY.—

9 “(i) Notwithstanding section 362 of  
10 title 11, neither the filing of an application  
11 under subsection (a)(3) nor any order or  
12 decree obtained by SIPC from the court  
13 shall operate as a stay of any contractual  
14 rights of a creditor to liquidate, terminate,  
15 or accelerate a securities contract, com-  
16 modity contract, forward contract, repur-  
17 chase agreement, swap agreement, or mas-  
18 ter netting agreement, each as defined in  
19 title 11, to offset or net termination values,  
20 payment amounts, or other transfer obliga-  
21 tions arising under or in connection with 1  
22 or more of such contracts or agreements,  
23 or to foreclose on any cash collateral  
24 pledged by the debtor whether or not with

1           respect to 1 or more of such contracts or  
2           agreements.

3           “(ii) Notwithstanding clause (i), such  
4           application, order, or decree may operate  
5           as a stay of the foreclosure on securities  
6           collateral pledged by the debtor, whether  
7           or not with respect to 1 or more of such  
8           contracts or agreements, or securities sold  
9           by the debtor under a repurchase agree-  
10          ment.

11          “(iii) As used in this section, the term  
12          ‘contractual right’ includes, but is not lim-  
13          ited to, a right set forth in a rule or bylaw  
14          of a national securities exchange, a na-  
15          tional securities association, or a securities  
16          clearing agency, a right set forth in a  
17          bylaw of a clearing organization or con-  
18          tract market or in a resolution of the gov-  
19          erning board thereof, and a right, whether  
20          or not in writing, arising under common  
21          law, under law merchant, or by reason of  
22          normal business practice.”.

1 **SEC. 13. SEVERABILITY; EFFECTIVE DATE; APPLICATION**  
2 **OF AMENDMENTS.**

3 (a) SEVERABILITY.—If any provision of this Act or  
4 any amendment made by this Act, or the application of  
5 any such provision or amendment to any person or cir-  
6 cumstance, is held to be unconstitutional, the remaining  
7 provisions of and amendments made by this Act and the  
8 application of such other provisions and amendments to  
9 any person or circumstance shall not be affected thereby.

10 (b) EFFECTIVE DATE.—This Act shall take effect on  
11 the date of the enactment of this Act.

12 (c) APPLICATION OF AMENDMENTS.—The amend-  
13 ments made by this Act shall apply with respect to cases  
14 commenced or appointments made under any Federal or  
15 State law after the date of enactment of this Act, but shall  
16 not apply with respect to cases commenced or appoint-  
17 ments made under any Federal or State law before the  
18 date of enactment of this Act.

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